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Office Supreme Court,
FILED
APR 10 1933
CHARLES ELMORE CRO
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

STATES OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA, Complainants, vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, Defendants, STATE OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI, AND ARKANSAS, Intervening Defendants.	}	No. 5, Original.
STATE OF MICHIGAN, Complainant, vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, et al., Defendants.	}	No. 8, Original.
STATE OF NEW YORK, Complainant, vs. STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, et al., Defendants.	}	No. 9, Original.

BRIEF OF THE SANITARY DISTRICT OF CHICAGO ON LEGAL QUESTIONS PRESENTED BY REPORT OF EDWARD F. McCLENNEN, SPECIAL MASTER.

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BRIEF FOR THE SANITARY DISTRICT OF CHICAGO ON LEGAL QUESTIONS PRESENTED BY REPORT OF EDWARD F. McCLENNEN, SPECIAL MASTER.

I.

The Court is without power to make any further order enlarging, amending or modifying the decree of April 21, 1930.

Under its constitutional power to regulate commerce between the States, Congress possesses complete and paramount power over all navigable interstate waterways and whenever Congress chooses to exercise that power it becomes exclusive.

In and by the Rivers and Harbors Act of July 3, 1930, Congress established a continuous Federal navigation project

from Lake Michigan to the Mississippi River and assumed complete and plenary control over the diversion of water from Lake Michigan through the Chicago sanitary canal.

Notwithstanding the views herein expressed as to the lack of power of the Supreme Court, the Sanitary District, in good faith, fully intends with all possible expedition to complete its program of construction of sewage treatment works and appurtenances which in fact was under way prior to the entry of the decree.

There can be no doubt that under its constitutional power to regulate commerce between the states, the Congress possesses complete power over all navigable interstate waterways, and whenever Congress chooses to exercise that power it becomes exclusive and paramount. It must necessarily follow, therefore, that therefter the Supreme Court is precluded from exercising any power of regulation or control over such waterway.

In his report on the original reference, the former Special Master (now Mr. Chief Justice Hughes), among other things said (page 148):

> "My conclusion is that the action of Illinois in diverting water from Lake Michigan through the drainage canal of the Sanitary District was, and is, unlawful *unless validly permitted* by Congress either directly or through the action of the Secretary of War." (Italics ours.)

The complainant states challenged the power of Congress to permit the diversion then in question, either directly or through authority conferred on the Secretary of War, upon the grounds

> "(1) that the diversion constitutes a taking of complainants' property without due process of law and without just compensation in violation of the Fifth Amendment; (2) that Congress could not authorize the diversion from the Great Lakes-St.

Lawrence watershed to the Mississippi watershed; (3) that the authorization of the diversion would constitute a preference of the ports of one State over those of another in violation of Article I, Section 9, Clause 6, of the Constitution; (4) that the power of Congress extends to the protection and improvement of navigation but not to its destruction or to the creation of obstructions to navigable capacity; and (5) that the diversion is for purposes of sanitation and development of power rather than of navigation and hence is outside the authority of Congress under the commerce clause" (Report, page 149).

Each of these contentions was carefully examined by the Special Master, who upon consideration denied their validity (pages 149 to 170 inclusive). In his discussion of number (4) the Special Master said (page 164):

> "I find no basis for a different rule with respect to the abstraction of water from Lake Michigan and the consequent lowering of lake levels. The question whether such an abstraction should be altogether prohibited, or the extent to which it should be permitted with regard to the interests of navigation, when and in what circumstances and in what amount a diversion of water from the lake would constitute an obstruction to navigation, are questions *within the power of Congress to decide* in the exercise of its control over navigable waters for the purposes of navigation. When these questions *have been determined by Congress,* or under its authority validly conferred, they are *not open to reconsideration by the court.*" (Italics ours.)

In discussing the extent of the power of Congress and the supposed power of the court to review the exercise of the same the Special Master said (page 161):

> "But it does not follow that when Congress does act in reasonable relation to the control of navigation, the Court may review the exercise of the dis-

> cretion of Congress and decide for itself whether that which Congress has authorized is a benefit to navigation or the reverse. It is of the essence of the power of Congress that it has the final determination of that question. The improvement of navigation, the protection and promotion of its facilities and the creation or removal of obstructions to it, involve questions of relation and degree. What may appear to be a destruction or obstruction at one point, with respect to the interests of navigation, may be a benefit or improvement to navigation at another point or in the light of a different relation. When it appears that navigation is affected, it also appears that the question is one for Congress to decide in the light of all pertinent facts. * * * It is for Congress, after considering, as it is presumed to consider, the interests of particular localities and of all regions that may be affected by its action, and the consequences to navigation in all its aspects, to determine what is or is not to be deemed an obstruction to navigation, *and its decision in this respect is not subject to judicial review.*" (Italics ours.)

The report of the eminent and learned Special Master spoke as of a date prior to the passage of the "Rivers and Harbors Act" of July 3, 1930. At that time there was no authorized continuous federal navigation project extending from Lake Michigan to the Mississippi. In other words, Congress had not exercised the powers which under the constitution it indisputably possessed over that portion of the "Lakes to Gulf waterway" which had not yet been made a part of the federal project. It was undoubtedly for that reason that in his report on re-reference the Special Master said (page 122):

> "Under the opinion of this Court in the present suits, the question of the allowance of a diversion of water from Lake Michigan in the interest of a

> waterway to the Mississippi is not deemed to be open to consideration. The Court found that *Congress had not acted directly so as to authorize the diversion in question,* and the Court referred to the declaration of Congress in the Rivers and Harbors Act of January 21, 1927, (44 Stat. 1013), providing for the improvement of the channel of the Illinois River, that nothing in the Act should be construed as authorizing any diversion of water from Lake Michigan. Accordingly, in dealing with the claims of the States intervening herein on the side of Illinois, the Court said that 'They really seek affirmatively to preserve the diversion from Lake Michigan in the interest of such navigation' (of the Mississippi) 'and interstate commerce though they have made no express prayer therefor. In our view of the permit of March 3, 1925, and *in the absence of direct authority from Congress for a waterway from Lake Michigan to the Mississippi,* they show no rightful interest in the maintenance of the diversion' (278 U. S. 367, 420)."

It is respectfully submitted that there can be no doubt that throughout both reports of the Special Master and throughout the opinions of the court wherever the subject matter is discussed, it is recognized that whenever it chooses to exercise the same, plenary power is possessed by Congress to the exclusion of all authority over questions relating to and affecting navigation in and upon federal waterways and (in so far as they may affect navigation) questions of diversion of water for purposes of sanitation.

It is respectfully submitted that the passage of the "Rivers and Harbors Act" of July 3, 1930, carried with it as a necessary consequence the assumption by Congress of complete and plenary control over the diversion of water from Lake Michigan through the Chicago sanitary canal for any purpose whatever, either navigation or sanitation, and thereby excluded

the further exercise by the Supreme Court of power over the same subject matter. In other words, the question of diversion has been removed from the jurisdiction of the Supreme Court.

In and by said act, the Congress adopted the Illinois River as an authorized federal navigation project, and thereby established a continuous and connected federal project from the mouth of the Chicago river to the Mississippi River. The language of the act in part is as follows:

> "That the following works of improvement are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans recommended in the reports hereinafter designated. * * * *
>
> "Illinois River, Illinois, in accordance with the report of the Chief of Engineers, submitted in the Senate Document Numbered 126, Seventy-first Congress, second session, and subject to the conditions set forth in his report in said document, but the said project shall be so constructed as to require the smallest flow of water with which said project can be practically accomplished, in the development of a commercially useful waterway; *Provided,* that there is hereby authorized to be appropriated for this project a sum not to exceed $7,500,000: *Provided further,* that the water authorized at Lockport, Illinois, by the decree of the Supreme Court of the United States, rendered April 21, 1930, and reported in volume 281, United States Reports, in Cases Numbered 7, 11, and 12, Original—October term, 1929, of Wisconsin and others against Illinois, and others, and Michigan against Illinois and others, and New York against Illinois and others, according to the opinion of the court in the cases reported as Wisconsin against Illinois, in volume 281, United States, page 179, is hereby authorized to be used for the navigation of said waterway:

Provided further. That as soon as practicable after the Illinois waterway shall have been completed in accordance with this Act, the Secretary of War shall cause a study of the amount of water that will be required as an annual average flow to meet the needs of a commercially useful waterway as defined in said Senate document, and shall, on or before January 31, 1938, report to the Congress the results of such study with his recommendations as to the minimum amount of such flow that will be required annually to meet the needs of such waterway and that will not substantially injure the existing navigation on the Great Lakes to the end that Congress may take such action as it may deem advisable."

Whether or not the jurisdiction of the Supreme Court over the question of diversion was superseded by Congress in the passage of the "Rivers and Harbors" act of 1930 is to be determined by ascertaining whether or not that act evidences an intention on the part of Congress to assume and exercise control over the waterway. If such intention is evident, then, since the power of Congress is plenary and paramount in respect to diversion for any purpose, it must necessarily follow that in this instance the power of the legislative has displaced that of the judicial department of the federal government.

It is respectfully submitted that the intention of Congress to assume control over the waterway so clearly appears that no room is left for argument.

If the "Rivers and Harbors" act were silent in reference to the question of diversion or the quantity thereof, there might be some possibility of arguing that Congress had not yet chosen to exert the full measure of its power and that the decree of the Supreme Court should be regarded as binding and effective until superseded by specific action on the part of Congress. But

the act specifically deals with, among other things, the question of diversion. Thus it provides that the:

> "water authorized at Lockport, Illinois, by the decree of the Supreme Court of the United States rendered April 21, 1930, and reported in volume 281, United States Reports, in cases number 7, 11 and 12 Original—October Term, 1929 * * * is hereby authorized to be used for navigation of said waterway."

The act also provided for the making of a study

> "of the amount of water that will be required as an annual average flow to meet the needs of a commercially useful waterway,"

the results of such study to be reported to Congress on or before January 31, 1938.

If Congress in the "Rivers and Harbors" act had specifically authorized a diversion of quantities of water different from those specified in the decree, it is believed that no one would for a moment doubt that the provisions of the decree to that extent were superseded. The mere fact that Congress authorized the same quantity of diversion as that specified in the decree does not alter the fact that Congress has acted,—that it has chosen to exercise the power which it at all times possessed. The act specifies the diversion permitted shall remain in force until January 31, 1938, and that when Congress shall receive the report in the act referred to, Congress will then fix the maximum or minimum quantity of diversion to be permitted.

There consequently is no room for the contention that by adopting the figures specified in the decree Congress intended that the decree should continue in force or that the power of Congress in the premises should be subordinate to that of the court.

The opinion of the court (281 U. S. 179) expressly recognized the paramount power of Congress over the

subject matter and in effect implied that if and when Congress should choose to exercise its power, it might do so notwithstanding the decree to be entered. In other words, it fairly may be said that the decree was entered without prejudice to the right of Congress under its plenary and paramount power to assume control over the matter of diversion.

Thus, in the opinion the court, speaking through Mr. Justice Holmes, said (page 197):

> "These requirements as between the parties are the constitutional right of those states, subject to whatever modification they hereafter may be subjected to by Congress acting within its authority. It will be time enough to consider the scope of that authority when it is exercised. In the present condition there is no invasion of it by the former decision of this court as urged by the defendants. The right of the complainants to a decree is not affected by the possibility that Congress may take some action in the matter."

Again the Court said (pp. 198, 199):

> "All action of the parties and the court in this case will be subject, of course, to any order that Congress may make in pursuance of its constitutional powers and any modifications that necessity may show should be made by this court."

As to the general proposition that the federal government possess complete and paramount jurisdiction whenever it chooses to exercise the same over interstate navigable waters and that this power is vested primarily in the legislative department of the federal government and by it from time to time delegated to the executive department, the authorities are numerous and uniform.

Below are cited some of the decisions of this Court which specifically recognize the paramount authority of the Congress over navigable interstate waters:

Pennsylvania v. *Bridge Co.*, 59 U. S. 421.
Wisconsin v. *Duluth*, 96 U. S. 379.
South Carolina v. *Georgia*, 93 U. S. 4
Sanitary District v. *U. S.*, 266 U. S. 405.
Oyster Co. v. *Briggs*, 229 U. S. 82.

A large number of additional cases will be found cited in 8 Ency. U. S. Supreme Ct. Rep. 854, note 27.

It may be contended that the Supreme Court may retain jurisdiction to compel the Sanitary District to carry out the construction program so that it will not be necessary to have the diversion augmented by Congress to obviate pollution in the waterway; that Congress in the Rivers and Harbors Act of July 3, 1930, did not ignore the premises upon which the decree was based, and cannot relieve the Sanitary District of any duty imposed by the decree.

We submit that such contentions would be utterly untenable.

The Supreme Court has no power to act concurrently with Congress in respect of diversion either for sanitation or for navigability. The power of Congress in both respects is plenary, paramount and exclusive; and Congress unquestionably has the power to supersede that part of the decree of the court which deals with diversion.

The Court recognized that its jurisdiction terminates when Congress acts. We previously have quoted from the decision to that effect in the case of *Wisconsin* v. *Illinois, supra.*

We have also previously quoted from the report of the Special Master (Chief Justice Hughes) in which he

held that Congress has the power to legislate for the prevention of pollution.

It is respectfully submitted that once Congress has exercised its power over navigable water, the only power that is left the Supreme Court is a reviewing power to determine whether Congress has acted within constitutional limits; and whether the Secretary of War to whom Congress has delegated power has abused his discretion. The established rule is that the courts have no power to control or defeat the will of Congress in respect of navigable waters provided that Congress acts reasonably and does not transcend the limits established by the law of the land.

8 *Ency. of Supreme Ct. Rep.*—p. 855.

Congress is not bound by the executory provisions of the decree.

Those provisions, being executory, are subject to change or modification by Congress. In fact, those provisions may be ignored by Congress and Congress independently may fix the amount of diversion. If Congress did not possess this right, its power could be nullified by the court. Instead of Congress having the plenary, paramount and exclusive power, the court would possess that power.

There are explicit decisions of the Supreme Court which directly or by analogy support our contention that the Rivers and Harbors Act of July 3, 1930, supersedes the executory provisions of the decree.

Perhaps the leading case and one that is squarely in point is that of the *State of Pennsylvania* v. *Wheeling and Belmont Bridge Company,* 18 How. (59 U. S.) 421.

This was an original proceeding in the Supreme Court begun by bill filed by the State of Pennsylvania for the removal of an alleged obstruction to the navigation of

the Ohio River caused by the erection and maintenance of certain bridges at Wheeling.

In May, 1852, the Court rendered a decree which declared the bridge in question to be an obstruction of the free navigation of the Ohio River and directed that the obstruction be removed either by elevating the bridge to a height designated or by abatement.

In August, 1852, before the decree had been executed, by an Act of Congress, the bridges were declared to be lawful structures in their then condition.

Subsequently the main bridge was blown down in a storm.

The company was making preparations to rebuild it when the State of Pennsylvania filed a bill praying for injunction.

No opposition was made on the part of the company and the injunction was granted as a matter of course. The company disregarded the injunction. There were motions by the State for attachment and sequestration of the property of the company for contempt and a motion by the company to dissolve the injunction. The Court denied the motion for the attachment and granted the motion to dissolve the injunction. In its opinion the Court, among other things, said (page 431):

> "The defendants rely upon this act of Congress as furnishing authority for the continuance of the bridge as constructed, and as superseding the effect and operation of the decree of the court previously rendered, declaring it an obstruction to the navigation."

In deciding that the act of Congress superseded the the decree, the Court said (pp. 431-432):

> "Now, we agree, if the remedy in this case had been an action at law, and a judgment for damages, the right to these would have passed beyond the reach of the power of Congress. * * * * But that

part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. * * * * If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the *decree of the court cannot be enforced.*"

This case has been cited with approval in the following cases:

Hodges v. *Snyder,* 261 U. S. 600, 603, 604.
U. S. v. *Chandler-Dunbar Co.,* 229 U. S. 53, 64, 65.
Luxton v. *Bridge Co.,* 153 U. S. 525, 531.
Miller v. *Mayor of New York,* 109 U. S. 325, 396.
Bridge Co. v. *United States,* 105 U. S. 470, 480, 481, 482, 483.
Stockdale v. *Insurance Companies,* 20 Wall (87 U. S.) 323, 332.
The Clinton Bridge, 10 Wall (77 U. S.) 454, 462.

The case of *Wisconsin* v. *Duluth,* 96 U. S. 379, was an original proceeding in the Supreme Court begun by bill in equity by the State of Wisconsin praying for an injunction to restrain the city of Duluth from maintaining a canal which had been constructed by the city, the effect of which was to lower the level of the water in the St. Louis river and to injure and destroy the navigable waterway adjacent to the State of Wisconsin. A mandatory injunction was also prayed to compel Duluth to fill up the canal and to restore things in that regard to the condition of nature in which they were before the canal was made.

It appeared that theretofore Congress had taken control of all waters involved in the controversy, and

approved the construction of the canal and had appropriated money for pier and harbor work in the harbors of Duluth, Superior City, etc.

In denying the relief sought and dismissing the bill, the Court among other things said (page 382):

> "The answer also sets up as an affirmative defense to the relief sought by the bill, that the United States, by the legislative and executive departments of the government, have approved of the construction of the canal; have taken possession and control of the work; have appropriated and spent money on it, and adopted it as the best mode of making a safe and accessible harbor at the western end of the lake navigation."

The Court held that the evidence showed that the Congress had assumed jurisdiction and control of the canal and harbor improvement and that such was within the constitutional power of Congress.

In discussing the exclusive character of the power of Congress the Court said (page 383):

> "It cannot be necessary to say that when a public work of this character has been inaugurated or adopted by Congress and its management placed under the control of its officers, there exists no right in any other branch of the government to forbid the work, or to prescribe the manner in which it shall be conducted."

In discussing the respective powers of Congress and the Supreme Court, the Court said (page 387):

> "If then Congress in the exercise of a lawful authority has adopted and is carrying out a system of harbor improvements at Duluth, this Court can have no lawful authority to forbid the work. * * *"

In the case at bar if Congress did not have the power to supersede the executory provisions of the decree in respect of diversion, there would exist the anomalous

situation of the Supreme Court exercising a compulsory power over the Sanitary District to compel the District to comply with the construction program of the decree or be deprived of the right to divert water, although under the Act of Congress the District would have the right, without any conditions imposed, to a diversion of the same amounts of water as prescribed in the decree.

The Rivers and Harbors Act of July 3, 1930, does not provide explicitly that the Supreme Court may retain jurisdiction to compel the Sanitary District to comply with the executory portions of the decree, and reasonably, it cannot be maintained that it so intended by implication. Such an interpretation would be contrary to the maxim *expressio unius est exclusio alterius.* The Act refers to the decree for one purpose only and that is as to the measure of the diversion. The very fact that the Act makes no other provision in respect of the decree would exclude the interpretation that the Act intended that the executory parts of the decree should remain in force. Furthermore, this conclusion is strengthened when we consider the conflict which would result from the concurrent exercise of power by Congress and the Supreme Court.

In the executory parts of the decree in regard to future diversions, the court (by way of injunction, and negatively) exercised the power to grant permission to the Sanitary District to divert certain quantities of water. But this power now belongs exclusively to Congress, and consequently, the court no longer possesses such power, if it ever did.

In view of the authorities and what is hereinbefore said, it is respectfully submitted that since Congress has now chosen to exercise its power and since that power when exercised is plenary and paramount, the

jurisdiction of the court has now been superseded or excluded and the court is without power further to deal with the matter, except in so far as it may possess the power of passing upon the legality or otherwise of any order which hereafter may be made or permit issued by the Secretary of War in the exercise of the powers delegated to him by Congress.

Respectfully submitted,

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